

ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARING

COCA CAFÉ,	:	In Re: Coca Café
	:	3811 Butler Street
Appellant,	:	Pittsburgh, PA 15201
	:	
v.	:	<u>Copies Sent To:</u>
	:	Carrie Rudolph
ALLEGHENY COUNTY HEALTH	:	Owner, Coca Café
DEPARTMENT,	:	3811 Butler Street
	:	Pittsburgh, PA 15201
Appellee.	:	
	:	Vijya Patel, Esq.
	:	Assistant Solicitor
	:	Allegheny County Health Department
	:	301 39 th Street, Building 7
	:	Pittsburgh, PA 15201

**DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH
DEPARTMENT HEARING OFFICER**

I. INTRODUCTION

The core question in this case is: Does a restaurant in Lawrenceville need to provide a second bathroom for customers, based on its seating capacity? In July of 2017, the Allegheny County Health Department (“ACHD”) issued a Notice of Violation to the Coca Café (“Appellant,” or the “Café”), instructing the Café to remove its seats or provide a second toilet room for customer use. The Café currently has between 35 and 40 seats, one single-occupancy toilet room for customers, and one single-occupancy toilet room that would require customers to walk through food preparation areas to access.

Carrie Rudolph (“Ms. Rudolph”), the owner of the Café, appealed the ACHD’s Notice of Violation, arguing that the Café is exempt from ACHD Regulations

pertaining to toilet rooms because it was used as a food facility before 1976. In other words, she contends that the Café is grandfathered in. The ACHD argues that the Café is not grandfathered in. First, the ACHD asserts that Ms. Rudolph failed to show that there was a food facility operating at the Café's location prior to 1976. Second, the ACHD argues that the Café's entire facility was not always used as a food facility, and that the rear portion of the facility was a residential apartment that Ms. Rudolph converted into a commercial kitchen.

At the end of the hearing, the ACHD offered Ms. Rudolph a choice: Either install a second toilet room for customer use or reduce the seating capacity.

After examining the testimony and evidence presented at the hearing, as well as the briefs and position statements submitted by the parties, I find that Appellant has met its burden of proof of demonstrating by a preponderance of the evidence that the Café is grandfathered in regarding the requirement that it must provide separate toilet rooms for each sex. Therefore, Appellant need not construct a second toilet room for customer use. However, Appellant must not allow customers to use the kitchen toilet room.

II. EVIDENCE

The following exhibits were offered by Appellant and admitted into evidence:

- A1: Obituaries

The following exhibits were offered by the ACHD and admitted into evidence:

- D1: Restaurant map
- D2: Variance
- D3: Application
- D4: Permit
- D5: Inspection report
- D6: Inspection report
- D7: Inspection permit
- D8: Inspection permit

III. FINDINGS OF FACT

Based on my review of the evidence and having resolved all issues of credibility, I find the following facts:

- 1) Carrie Rudolph is the owner of the Coca Café (Hearing Transcript (“H.T.”) at 3).
- 2) The Café has been in business since 2004. (H.T. at 3-4; Ex. D3).
- 3) When the ACHD issued a permit for the Café in 2004, the listed seating capacity was 16 guests. (Exs. D3, D4).
- 4) The Café now seats between 35 and 40 guests. (H.T. at 3).
- 5) The Café provides one toilet room for customer use. (H.T. at 37).
- 6) The Café also has a second toilet room near the kitchen (“kitchen toilet room”), which requires customers to walk through food preparation areas to access it. (H.T. at 37-38; Ex. D1).
- 7) Both toilet rooms are operable, unisex toilet rooms with one toilet each. (H.T. at 13, 17, 38).
- 8) In or around 2004, Appellant constructed an atrium to connect the kitchen to the dining area and provided additional seating. (H.T. at 10).
- 9) In April of 2016, Appellant requested a variance to allow the Café to increase its listed seating capacity to 36, without constructing an additional toilet room. (Ex.D2).
- 10) The ACHD denied Appellant’s request for a variance. (H.T. at 17).

- 11) On July 25, 2017, the ACHD issued an inspection report (“July 25th Report”) to Appellant, instructing her to remove all seats or provide a second toilet room for customer use at the Café. (Ex. D8).
- 12) On August 4, 2017, Appellant appealed the July 25th Report.
- 13) On October 3, 2017, an administrative hearing was held to resolve this matter.

IV. DISCUSSION

Under the ACHD Rules & Regulations in operation at the times when the appeal was filed, the hearing was held, and the briefs submitted, “The person filing the appeal shall bear the burden of proof and the burden of going forward with respect to all issues.” ACHD Rules & Regulations, Article XI § 1107(C).

A. Relevant ACHD Regulations

Article III § 316 of the ACHD Rules & Regulations, pertaining to toilet rooms, states that if seating is provided in a food facility, separate toilet rooms for each sex must be installed. Article XV § 403.1, pertaining to plumbing, declares that a restaurant must have two men’s toilet rooms for 1-50 male occupants and one women’s toilet room 1-25 female occupants. The customer toilet rooms must be in a location that does not require patrons to pass through food preparation or food storage areas. (Art. III § 316; Art. XV § 403.1; H.T. at 24).

B. Grandfather Clause

Ms. Rudolph’s core argument is that the Café does not need a second customer toilet room because the building in which the Café is located is grandfathered in. Article III § 316 of the ACHD Rules and Regulations, pertaining to toilet rooms, states in relevant part:

“A. Toilet rooms shall be convenient and adequate and shall be installed within the facility according to this Article.

B. Employee toilet rooms shall be accessible at all times.

C. Toilet rooms, separate for each sex, shall be required for patrons in food facilities where seating is provided. *Any food facility which was constructed prior to October 4, 1976 is exempt from this Section.*

D. Toilet seats for patrons cannot be accessed through food preparation or food storage areas.” (emphasis added).

There are two questions here. First, is the Café a “food facility which was constructed prior to October 4, 1976?” Second, if so, does the word “Section” in part (C) above mean that the Café is exempt from all the requirements of Article III § 316, or just the requirement that there be separate toilet rooms for each sex?

1. Constructed Prior to October 4, 1976

At the hearing, Ms. Rudolph presented evidence that the building in which the Café is located was a food facility constructed before October 4, 1976.

Specifically, Ms. Rudolph introduced two obituaries of a woman named Stella Zaborowski (“Ms. Zaborowski”), who owned a restaurant called “The Original Coffee and Hot Dog Shop” at Butler and 38th streets in Lawrenceville. (Ex. A1).

Ms. Rudolph claims that these obituaries indicate that the building that used to house the Café was a restaurant owned by Ms. Zaborowski starting sometime before World War II. (H.T. at 5-8). The obituaries state that the restaurant opened around the late 1930s, was “closed for a bit” during World War II, and reopened as a pizza place from the early 1960s until the mid-1980s. (Ex. A1; H.T. at 5).

The ACHD claims that Ms. Rudolph “must demonstrate that the facility was continuously used as a food facility from prior to October 4, 1976 onward, and that

the nature of the operations did not change.” (*ACHD Brief* at 8). The ACHD does not directly cite any authority for this proposition, and I cannot locate any requirements in the ACHD Food Safety or Plumbing Regulations saying so. Therefore, I do not find the ACHD’s “continuous use” and “nature of operations” arguments persuasive.

The ACHD makes three arguments for why the Café is not grandfathered in. First, the ACHD says Ms. Rudolph did not “demonstrate that the facility was continuously operated as a food facility from prior to October 4, 1976 and onwards” because there was a 20-year gap between when the pizza shop closed in the 1980s and when the Café opened in 2004. (*ACHD Brief* at 8). Second, the ACHD argues that the entire facility in which the Café is located was not always used as a food facility because Ms. Rudolph admitted that the rear portion of the facility was a residential apartment that she converted into a commercial kitchen. (H.T. at 14). Third, the ACHD points out that the obituaries do not specify the address for Ms. Zaborowski’s restaurants. (*ACHD Brief* at 8).

The ACHD’s first two arguments here are unpersuasive, as I do not find any textual or other legal support for the ACHD’s contention that a food facility must be continuously used as such from October 4, 1976 onward, and that the nature of operations must not change. This leaves the argument that the obituaries do not specifically mention the address for the restaurants purportedly located at 3811 Butler Street. In its brief, the ACHD states, “By failing to provide [address] information, this tribunal cannot assume that Appellant’s facility was used as a food facility prior to October 4, 1976.” (*ACHD Brief* at 8).

But this is not a matter of assumption; it's a matter of credibility. Under Pennsylvania law, credibility and evidentiary weight are within my discretion as the fact-finder in this case. *See Birdsboro & Birdsboro Mun. Auth. v. Dep't of Env'tl Protection*, 795 A.2d 444, 447-48 (Pa. Cmwlth. Ct. 2002) ("It is axiomatic that questions of resolving conflicts in the evidence, witness credibility, and evidentiary weight are properly within the exclusive discretion of the fact-finding agency.").

Here, I find Ms. Rudolph credible regarding the location of the restaurants operated by Ms. Zaborowski. At the hearing, Ms. Rudolph explained the basis for her knowledge that the Café was the location of Ms. Zaborowski's restaurants: "I only know that was the case because [Ms. Zaborowski's] family came in, it must be like five or ten years ago now, to look at the place and see what we'd done with it and they were so happy." (H.T. at 8).

Based on Ms. Rudolph's testimony and the obituary information she provided, I find that the Café is a "food facility which was constructed prior to October 4, 1976" under Article III § 316(C).

2. Interpreting the Word "Section"

Article III § 316(C) specifies: "Toilet rooms, separate for each sex, shall be required for patrons in food facilities where seating is provided. Any food facility which was constructed prior to October 4, 1976 is exempt from this *Section*." (Emphasis added).

The meaning of the word "Section" here is ambiguous. Does "Section" solely refer to § 316(C), which requires separate toilet rooms for each sex? Or does it

encompass the entirety of § 316, which also states, “Toilet seats for patrons cannot be accessed through food preparation or food storage areas?” Art. III § 316(D).

I find that the more reasonable interpretation is that the word “Section” only refers to § 316(C) regarding separate toilet rooms for each sex. First, § (C) is the only provision of § 316 that mentions an exemption of any kind. Second, if food facilities constructed before October 4, 1976 were exempt from the entirety of § 316, it would make more sense logically to mention this exemption either at the beginning or the end of § 316, rather than squarely in the middle.

Based on this interpretation, I find that the Café is exempt from the requirement to provide separate toilet rooms for each sex, but is not exempt from the requirement that customer toilet rooms cannot be accessed through food preparation or storage areas, or from any other provision of Article III § 316.

V. CONCLUSION

I find that Appellant has met its burden of proof of demonstrating by a preponderance of the evidence that the Café is grandfathered in regarding the requirement that it must provide separate toilet rooms for each sex. Therefore, Appellant need not construct a second toilet room for customer use. However, Appellant must not allow customers to use the kitchen toilet room.

/s/
Max Slater
Administrative Hearing Officer
Allegheny County Health Department

Dated: January 2, 2018